Supreme Court, U.S.
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No. 04-1292

In The
Supreme Court of the United States

PEMCO AEROPLEX, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a jury verdict and final judgment in a prior action brought by numerous individual plaintiffs finding that these plaintiffs were not subjected to a hostile work environment bars the Equal Employment Opportunity Commission from bringing a subsequent, identical action based solely on these prior unsuccessful plaintiffs' EEOC charges, seeking victim-specific and equitable remedies for the benefit of a class including these same plaintiffs.

II. Whether the voluntary settlement of all claims by plaintiffs in a prior action bars the Equal Employment Opportunity Commission from bringing a subsequent action on the same claims, based solely on these plaintiffs' charges, seeking victim-specific and equitable remedies for the benefit of a class including these same plaintiffs.

III. As a matter of first impression, is the EEOC barred from re-litigating the presence of a hostile work environment on behalf of a class of African-American employees under the doctrines of Res Judicata and/or Collateral Estoppel, when that very "environment" has already been tried to a jury verdict on behalf of individual members of the class twenty-two prior times?

PARTIES TO THE PROCEEDINGS

The caption of the case includes all parties to the proceeding in the District Court and Court of Appeals.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that Pemco Aviation Group, Inc. ("PAGI"), a publicly held company, is the parent company of Pemco Aeroplex, Inc. No publicly held corporation owns 10% or more of PAGI's stock.

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42 U.S.C. § 2000e *et seq.* ("Title VII") 1

PETITION FOR A WRIT OF CERTIORARI

Pemco Aeroplex, Inc., by and through its attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 383 F.3d 1280 (**App. at 1**). The opinion of the District Court is unreported (**App. at 27**).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 13, 2004. A petition for rehearing was denied on December 23, 2004. (**App. at 35**) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 42 U.S.C. § 2000e *et seq.* ("Title VII").

STATEMENT OF THE CASE

The jurisdiction of the district court in the case at bar was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.* ("Title VII").

In 1999 thirty-six African-American employees of Pemco Aeroplex, Inc. ("Pemco") filed charges of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging a racially hostile work environment and other forms of racial discrimination. These thirty-six plaintiffs then filed suit against Pemco in December 1999, captioned *Thomas v. Pemco Aeroplex*, No. CV-99-AR-3280-S (N.D.Ala.). In October 2000, the EEOC filed its own lawsuit against Pemco under Title VII on behalf of all African-American Pemco employees. *EEOC v. Pemco Aeroplex, Inc.*, CV-00-AR-2762-S (N.D.Ala.). The sole basis for the EEOC's suit, alleging that Pemco subjected all African-American employees to a hostile work environment, was the thirty-six charges of discrimination filed by the *Thomas* plaintiffs. *EEOC v. Pemco Aeroplex, Inc.*, Complaint, CV-00-AR-2762-S. The EEOC suit sought injunctive relief and monetary compensation for the class of Pemco's current and former African-American employees, which the EEOC estimates to be approximately 200. *EEOC v. Pemco Aeroplex, Inc.*, Memorandum Opinion at 5, CV-00-AR-2762-S. The EEOC twice moved to consolidate its case with the *Thomas* case, which Pemco opposed, and while the motions to consolidate the cases for trial were denied, consolidation was ordered for purposes of discovery. Accordingly, the EEOC participated fully in joint discovery.

In April 2002 nine of the *Thomas* plaintiffs accepted Rule 68 offers of judgment from Pemco, and the claims of five additional plaintiffs were dismissed. The remaining twenty-two plaintiffs went to trial in June 2002 on claims that they had been constantly subjected to a racially hostile work environment since June 1992 and, in the words of the District Court, were represented by competent and

dedicated counsel. After a month-long trial, the jury, in response to special interrogatories, found that none of the Plaintiffs had been subjected to a racially hostile environment at Pemco. Based on this finding, the court denied Plaintiff's request for equitable relief and entered a final judgment in favor of Pemco. No appeal was taken.

Pemco then moved for summary judgment in the suit brought by the EEOC (the case at bar) on the grounds that it was barred by res judicata and collateral estoppel. This motion was based on the fact that the *Thomas* plaintiffs had either accepted a Rule 68 offer of judgment or, for those who had not settled, had already presented their claims to a jury and had been specifically found by that jury to not have been subjected to a racially hostile work environment.

The District Court, in ruling on Pemco's motion, "proceed[ed] on the broad assumption that questions of disputed fact that have been fully and fairly tried between the same parties or their privies in a case in which a final resolution has been reached by judgment, cannot, in the name of good sense and judicial economy, be tried again." The court ruled in Pemco's favor on the basis that the EEOC had fully participated in discovery in *Thomas*, that "the core factual dispute, i.e., whether or not a pervasively hostile racial environment existed at Pemco during the relevant time period, was tried to the hilt," and therefore, despite the fact that the thirty-six plaintiffs were foreclosed by the final judgments entered against them (or in their favor, in the case of those accepting Rule 68 settlements), the EEOC still sought relief specifically on their behalf as members of the class. *EEOC v. Pemco Aeroplex, Inc.*, Memorandum Opinion at 4, Dec. 13, 2002, CV-00-AR-2762-S (N.D.Ala.).

The EEOC appealed to the Eleventh Circuit Court of Appeals, and on September 13, 2004, a panel of that Court reversed the decision of the district court. The panel disagreed with the District Court's finding of privity between the *Thomas* plaintiffs and the EEOC, and held that the EEOC's enforcement role is incompatible with a finding that its authority to bring an enforcement action is barred by a judgment in a private suit. While the court did note that the Supreme Court in *EEOC v. Waffle House, Inc.*, had left "an open question whether a settlement or arbitration judgment" would affect the validity of the EEOC's claim, they indicated the EEOC should not be precluded from making a second attempt at recovery here for the prior unsuccessful private plaintiffs, "even when the prior action is fully contested to a jury verdict, because the private plaintiffs might have fewer resources, less experienced or able attorneys, or weaker legal claims than does the EEOC." *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1294 (11th Cir. 2004) (quoting *EEOC v. Waffle House*, 534 U.S. 279, 297, 122 S.Ct. 754, 766, 151 L.Ed.2d 755 (2002); *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 454 (5th Cir. 1975)). Pemco moved for a rehearing en banc, which was denied on December 23, 2004.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH *WAFFLE HOUSE*.

In *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), this Court stated that a plaintiff's conduct "may have the effect of limiting the relief that the EEOC may obtain in court, and recognized that under a decision of the Third Circuit 'individuals who

litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims.'" *Id.* at 296-97, 122 S.Ct. at 765-66) (quoting *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3rd Cir. 1990)). Yet the decision by the Eleventh Circuit in the case at bar contradicts this principle and allows the EEOC to obtain relief for the thirty-six *Thomas* plaintiffs despite the fact that they all have either settled their claims (by accepting Pemco's Rule 68 offer) or received an adverse final judgment specifically finding that they had not been subjected to a hostile work environment. In precisely the situation noted by the dissent in *Waffle House,* the EEOC is seeking to obtain the victim-specific relief for the thirty-six *Thomas* plaintiffs that they cannot seek for themselves. *Waffle House, supra,* at 300, 122 S.Ct. at 767 (Thomas, J., dissenting). The Eleventh Circuit's decision is also contrary to this Court's directive that "courts can and should preclude double recovery by an individual." *Waffle House,* 534 U.S. at 297 (quoting *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 333, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)). Nine of the *Thomas* plaintiff's were compensated for their claims through Rule 68 settlements, yet stand to receive a second recovery for the same claims through the EEOC's suit.

II. THE CIRCUITS ARE DIVIDED OVER WHETHER THE EEOC IS BOUND BY A PLAINTIFF'S PRIOR SETTLEMENT AND/OR VERDICT WHEN SEEKING THE SAME RELIEF ON BEHALF OF THAT INDIVIDUAL.

In addition to conflicting with *Waffle House,* the decision of the Eleventh Circuit panel also conflicts with

several other Circuits' decisions, creating a clear and current split among the Circuits.

The Third Circuit has expressly stated that "when the Commission seeks individualized benefits . . . for particular grievants, as it did in this case, the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies."[1, 2] *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 496 (3rd Cir. 1990). "A person who appears in his own behalf in litigation has had his day in court and is bound by the judgment. Just as he may not himself relitigate the claim thus decided, neither may he do so in a subsequent action prosecuted or defended through a representative." *U.S. Steel Corp.*, 921 F.2d at 493 (quoting *Restatement (Second) of Judgments*, § 42(2), Comment g (1980)). Even when functioning in its role of protecting the broader public interest,

> "the Commission's responsibilities *include* the representation of these grievants when it seeks individual relief on their behalf. Thus, when the Commission seeks individualized benefits under the ADEA [and presumably, under Title VII] for particular grievants, as it did in this case, the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies."

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[1] While this decision deals with an action under the ADEA, the controlling issue was the same as in the case at bar, namely "whether the private plaintiffs and the Commission are in privity." *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 493 (3rd Cir. 1990).

[2] It should be noted that the Court specifically refrained from deciding whether such individuals would be barred from sharing in the protection of an injunction that serves broader public interests.

U.S. Steel Corp., 921 F.2d at 496. The fact that the thirty-six individual plaintiffs from the *Thomas* suit were not named as parties in the EEOC's subsequent action is not an issue. "The absence of any formal designation of the individual claimants as parties . . . does not change the nature of the EEOC's role as the individuals' representative *and should not change the effect of the doctrine of claim preclusion.* By claiming or accepting individual relief won by the EEOC, the individuals would necessarily concede that the EEOC was their representative and that they were embraced by the EEOC's judgment." *Id.* (emphasis added.) "Thus, when the EEOC seeks to represent grievants by attempting to obtain private benefits on their behalf, the doctrine of representative claim preclusion must be applied." *Id.*

The decision of the court below also conflicts with the Seventh Circuit, which observed that "courts have held that the EEOC is precluded from seeking monetary relief for individuals who are barred from seeking the same relief themselves because their claims have been adjudicated. . . . " *EEOC v. North Gibson School Corp.*, 266 F.3d 607 (7th Cir. 2001). Thus, the Seventh Circuit has specifically stated "that there *is* privity between the EEOC and individuals for whom it seeks individual benefits." *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (citing *U.S. Steel Corp.*, 921 F.2d at 493-96) (emphasis added).[3] And in the case at hand, the EEOC has clearly

[3] It should be noted that the Seventh Circuit did hold that while the EEOC was barred by privity from seeking back pay or liquidated damages, it was not barred from seeking an injunction. However, there is an important factual distinction between *Harris Chernin* and the present case. In *Harris Chernin*, the claims brought by the individual were dismissed as untimely, so while the plaintiff was barred from

(Continued on following page)

stated, as noted by the District Court, that "the individuals whose claims were resolved in the [*Thomas*] case . . . were and remain technically members of the group for which the Commission seeks relief." *EEOC v. Thomas*, 2002 U.S. Dist. LEXIS 27662 at *5 (N.D.Ala. 2002).

The Fifth Circuit has also recognized that "the E.E.O.C. may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the E.E.O.C. seeks relief different from that sought by the individual." (Although the second suit would be permitted if it sought different relief.) *New Orleans Steamship Association v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (quoting *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 525 (5th Cir. 1980)). The relief sought by the EEOC in the present case is no different than the relief sought by the thirty-six plaintiffs. The EEOC seeks "a permanent injunction enjoining the Defendant . . . from engaging in any employment practices which discriminate on the basis of race" and damages "to make whole the class of Black employees by providing compensation for past and future pecuniary losses" and "non-pecuniary losses, including emotional pain, suffering, loss of enjoyment of life, and humiliation. . . .", while the individual plaintiffs sought an "injunction . . . prohibiting the Defendants . . . from engaging in the employment practices complained of herein" and damages "for past, present and future mental anguish, emotional distress,

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receiving damages the factual issues were never litigated. In the case at bar however, the factual issues related to discrimination were litigated "to the hilt" (in the words of the District Court), and a jury determined that no discrimination had occurred and no hostile work environment existed.

shame, intimidation, humiliation, indignation, embarrassment and fear and punitive damages. . . ." *EEOC v. Pemco Aeroplex, Inc.*, Complaint, CV-00-AR-2762-S (N.D.Ala. 2000); *Thomas v. Pemco Aeroplex*, Complaint, No. CV-99-AR-3280-S (N.D.Ala.).

And finally, while not definitively ruling on the issue, the Tenth Circuit has suggested that it would bar the EEOC's action in the present situation, quoting *Waffle House* for the premise that "[a]n aggrieved employee's conduct 'may have the effect of limiting the relief that the EEOC may obtain in court.'" *EEOC v. W.H. Braum, Inc.*, 347 F.3d 1192, 1201 (10th Cir. 2003) (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002)).

Contrary to these decisions, in addition to the decision by the lower court, are the positions of the Sixth and Ninth Circuits. The Sixth Circuit has held that in such a situation "preclusion cannot apply because the EEOC and [the individual plaintiff] are not in privity." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 463 (6th Cir. 1999). According to the Sixth Circuit, the EEOC's interest in suing on an individual plaintiff's behalf "extends beyond protecting [the plaintiff's] interest to the interest of the public in general. . . . [the plaintiff] could not adequately represent the EEOC's broad interest . . . by bringing a private Title VII suit. Given a statutory framework and history that vests in the EEOC and not private individuals the power and responsibility to represent not only individual but also public interests whenever it sues

in its own name, we cannot conclude that the EEOC and [an individual plaintiff], without more, are privies." *Id.*[4]

Likewise, the Ninth Circuit has held that a settlement agreement with individual plaintiffs in a Title VII action does not bar a subsequent action by the EEOC seeking injunctive relief, since by seeking injunctive relief "the EEOC promotes *public* policy and seeks to vindicate rights belonging to the United States as sovereign." *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (quotation omitted.) However, the lower court's decision does conflict with this decision of the Ninth Circuit in that the Ninth Circuit, while permitting the EEOC to pursue injunctive relief, barred the EEOC from seeking back pay because "any recovery of back pay by the EEOC would go directly to [the individual plaintiff] who has freely contracted away her right to back pay. Thus, the public interest in a back pay award is minimal." *Goodyear Aerospace Corp.*, 813 F.2d at 1543. Conversely, the lower court believes that "it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation rather than pocketing the money itself," and as such the EEOC is not barred from seeking monetary relief for the benefit of the individual plaintiffs.

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[4] However, because the issue was whether a mandatory arbitration clause applicable to the plaintiff bound the EEOC, the Court did note that "the present case does not involve a prior suit [the issue] or even a prior arbitration that raised or resolved the issues raised in the EEOC's complaint," recognizing that *Harris Chernin* and *U.S. Steel* both precluded the EEOC's suit after individuals had filed unsuccessful suits on the same claims, and suggesting that they might decide the issue differently than the lower court in this case based on the presence of the prior suit. *Frank's Nursery & Crafts, Inc.*, 177 F.3d at 463.

EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1292 (11th Cir. 2004).

In the states comprising the Third, Fifth, and Seventh Circuits, a plaintiff or group of plaintiffs cannot get a second "bite at the apple," and the relationship between the individuals and the EEOC, seeking relief on behalf of these individuals, is recognized and would preclude the present suit, but in the states comprising the Sixth, Ninth, and Eleventh Circuits, the EEOC may present an individual's or group of individuals' claims to a second jury after a first jury has already ruled these same individuals suffered no discrimination, or may seek additional compensation for these individuals despite the fact that they have already received full compensation either through a prior judgment or through voluntary settlement.

III. THE EEOC SHOULD BE BARRED FROM RELITIGATING THE PRESENCE OF A HOSTILE WORK ENVIRONMENT ON BEHALF OF A CLASS OF AFRICAN-AMERICAN EMPLOYEES UNDER THE DOCTRINES OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL, WHEN THE VERY SAME "WORK ENVIRONMENT" HAS ALREADY BEEN TRIED TO A JURY VERDICT ON BEHALF OF INDIVIDUAL MEMBERS OF THE CLASS TWENTY-TWO TIMES.

A. An Issue of First Impression.

This is an issue of critical importance because it will decide the preclusive nature of **twenty-two jury verdicts.** Here, the EEOC seeks a second chance to try a class-wide hostile environment claim based on the same evidence twenty-two employees unsuccessfully presented

in an effort to prove the same work environment was hostile.[5] Specifically, the EEOC alleges that Pemco engaged in a pattern and practice of allowing each of its 200-plus African-American employees to be subjected to a racially hostile work environment. However, the EEOC's class claim is significantly more difficult to establish than the individual claims of the *Thomas* plaintiffs since, in order to prevail on its class claim, the EEOC must establish that Pemco had a pattern and/or practice of subjecting its African-American employees to a racially hostile work environment.

In order to establish a pattern and practice of discrimination, the EEOC "[u]ltimately ha[s] to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). This Court has never addressed whether collateral estoppel can be properly invoked against the EEOC in a pattern and practice hostile environment case when the very same "environment" has already been tried to a jury verdict. What sets this case apart is that a jury, after having heard the same witnesses and evidence upon which the EEOC relies, has already determined that Petitioner did not subject twenty-two employees (the ones most disturbed by

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[5] In pleadings filed with the District Court, the EEOC said: "It has become **obvious** through the discovery process **that the evidence needed to prove liability is strikingly similar in both cases**. In both suits, **the same witnesses will be called to provide testimony about the atmosphere found within the Defendant's Birmingham facility.**"

the environment) to a hostile environment. In light of the jury verdict, the government should not now be allowed to force Petitioner to try whether its regular practice was to subject employees to a hostile environment.

B. The EEOC was in Privity with the Private Plaintiffs.

This Court has held:

> "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ."

Montana, et al. v. United States, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)). Here, the district court made a finding of fact that the EEOC was in privity with the *Thomas* plaintiffs.

> "Privity is defined as a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty." *Id.*

There are varied means by which privity has been found to exist. "Privity exists where the nonparty's interests were represented adequately by the party in the original suit." *Id.* "Privity also exists where a party to the original suit is 'so closely aligned to a nonparty's interest as to be his virtual representative.'" *Id.* (quoting *United Merchants & Mfrs. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987)). Further, "one . . . who assists in the prosecution or defense of an

action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." *Montana*, 440 U.S. at 154.

In the case at bar, the *Thomas* Plaintiffs adequately represented the EEOC's interests and were very closely aligned with the interests of the EEOC. Further, the EEOC assisted in the prosecution of the *Thomas* case. With regard to adequate representation, the *Thomas* Plaintiffs spent nearly four weeks trying to prove that the atmosphere at Pemco's workplace was so pervaded with racial hostility that every black Pemco employee was necessarily subjected to a racially hostile work environment. In their effort, the *Thomas* plaintiffs offered the same evidence upon which the EEOC relies and which it plans to present. Further, it is clear that the *Thomas* plaintiffs and the EEOC shared a common interest in attempting to prove the presence of a racially hostile work environment.

During the trial, the *Thomas* Plaintiffs admitted into evidence every conceivable piece of evidence that tended to show an atmosphere of racial hostility at Pemco's facility, and the district court determined there was little else the EEOC could possibly offer in its case. Like the EEOC in this case, the interests of the *Thomas* Plaintiffs was establishing that an atmosphere of racial hostility pervaded the work environment at Pemco's facility. Furthermore, prior to trial, the *Thomas* plaintiffs, in cooperation with the EEOC, engaged in extensive pretrial discovery including taking twenty (20) depositions of Pemco management officials and other witnesses. The EEOC was present at each of the depositions and questioned the witnesses in conjunction with the attorneys for the *Thomas* plaintiffs. Also, the EEOC had one of its lawyers

present in the courtroom during each trial day, and counsel for the EEOC constantly conferred with counsel for the *Thomas* plaintiffs throughout the trial. Clearly, the *Thomas* plaintiffs performed an adequate job of representing the same interests pursued by the EEOC in this action, and the EEOC assisted in the prosecution of the *Thomas* case.

The EEOC also actively assisted the prosecution of the *Thomas* case throughout its pendency. These facts are evidenced by the coordination and joint decision making reflected in the *Thomas* plaintiffs' fee petition. Plaintiffs' counsels' attorneys' fees itemization shows at least twenty-six (26) meetings and phone consultations between the attorneys for the EEOC and the *Thomas* lawyers and paralegals. The itemization lists at least four "strategy" meetings that occurred prior to trial as well as meetings to discuss experts, motions and discovery. The EEOC was intimately involved and actively assisting in the prosecution of the case.

The questions presented in this case can be expected to recur frequently in the future. In 2004 alone, the EEOC filed 378 merit suits and resolved 347 current and prior merit suits, recovering over $168 million. See http://www.eeoc.gov/stats/litigation.html (February 28, 2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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383 F.3d 1280

United States Court of Appeals,
Eleventh Circuit.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v.

PEMCO AEROPLEX, INC., Defendant-Appellee.

No. 03-10719.

Sept. 13, 2004.

Barbara L. Sloan, EEOC, Washington, DC, for EEOC.

Jeffrey A. Lee, Stephen E. Brown, Maynard, Cooper & Gale, P.C., Birmingham, AL, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before MARCUS and WILSON, Circuit Judges, and DUPLANTIER*, District Judge.

MARCUS, Circuit Judge:

At issue today is whether the plaintiff, Equal Employment Opportunity Commission ("EEOC"), may proceed with a Title VII enforcement action charging the defendant Pemco Aeroplex, Inc. ("Pemco") with company-wide racial harassment, notwithstanding an adverse judgment rendered in a separate action brought by a number of individual plaintiffs who alleged racial harassment by the same defendant. The district court entered summary judgment for the defendant holding that the

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* Honorable Adrian G. Duplantier, United States District Judge for the Eastern District of Louisiana, sitting by designation.

EEOC was bound by the prior judgment even though the Commission's suit covers employees who were not part of the earlier private suit and notwithstanding that the EEOC was twice denied the opportunity to consolidate its case with the private suit. Because we conclude that there was no privity between the EEOC and the private plaintiffs in the prior action, the district court erred in applying the doctrines of res judicata and collateral estoppel. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

I

The facts and procedural history of this case are straightforward. On December 9, 1999, thirty-six African-American employees of Pemco, a military airplane repair and maintenance facility, filed suit in the Northern District of Alabama against their employer, claiming that Pemco violated 42 U.S.C. § 1981 by subjecting them to racial harassment and other forms of race discrimination. *See Thomas v. Pemco Aeroplex*, No. CV-99-AR-3280-S (N.D.Ala.). The case was initially brought as a class action, but the plaintiffs withdrew their class claim after Pemco opposed certification, and prosecuted the case as thirty-six individual plaintiffs consolidated in one action.

At the same time, the EEOC was investigating multiple charges of discrimination at Pemco, having uncovered possible evidence of nooses, racially inflammatory graffiti, racial slurs by coworkers and supervisors, and other disconcerting incidents of race-related conduct at Pemco's Birmingham facility dating back at least to the late 1980s. In September 2000, the EEOC brought its own suit (the instant case) against Pemco under Title VII of the Civil

Rights Act, 42 U.S.C. § 2000e, alleging that Pemco subjected its 200 or more black employees to a racially hostile work environment. The EEOC sought injunctive relief and monetary compensation for all of the company's 200 or more black employees. This case was assigned to the same district judge who was hearing the *Thomas* case.

In October 2000, the EEOC moved to consolidate this suit with the private action (the *Thomas* case), noting that the two cases involved the same witnesses and issues, and raised common issues of law and fact. Pemco vigorously opposed the motion, arguing that the suits were substantially different and that consolidation would cause the company extreme prejudice. Specifically, Pemco argued that the EEOC's suit involved only one substantive claim – a hostile work environment claim covered by Title VII – while the *Thomas* suit involved dozens of individual plaintiffs, each with his own claims. The district court denied, without explanation, the request to consolidate the cases for trial, but granted the EEOC's application that discovery undertaken in either case could be used to the extent relevant in the other case.

In February 2002, after discovery in the private suit was completed, the EEOC again moved to consolidate the cases for trial, and offered to forgo further discovery in its own case for the chance to try the cases together. Pemco again opposed the motion, contrasting the EEOC's broad suit alleging class-wide discrimination with the thirty-one[1] private plaintiffs' individual claims. Indeed, Pemco argued that much of the evidence of class-wide discrimination

[1] By this point, several of the original plaintiffs' claims had been dismissed on procedural grounds.

pertinent to the EEOC's suit would be not only irrelevant but also prejudicial to the individual claims. Again, the district court denied the consolidation motion without explanation.

During discovery, the EEOC had attended most of the depositions of the witnesses. The EEOC's attorneys met or conferenced with counsel for the individual plaintiffs on many occasions prior to trial. In April 2002, nine of the *Thomas* plaintiffs, including the lead plaintiff, settled with Pemco. The remaining twenty-two plaintiffs – who had worked in various parts of Pemco's facility – went to trial before a jury in June. During that trial, an EEOC attorney was present in the courtroom about half the time according to the EEOC, and virtually each day, according to Pemco.[2] Notably, EEOC's counsel did not sit at counsel table during the trial, offer evidence, examine witnesses, or otherwise participate in the trial of the *Thomas* case.

On June 26, the jury found that none of the twenty-two plaintiffs had been subjected to a hostile work environment between December 9, 1997 and June 3, 2002. The jury was not asked to determine whether a racially hostile work environment existed at Pemco during that time frame. Rather, the jury was asked to decide whether each individual plaintiff had been subjected to a hostile work environment on account of race. The jury answered "no" as to each plaintiff. The court entered judgment against the twenty-two plaintiffs who had gone to trial in the *Thomas*

[2] According to the district court's order, the EEOC's attorney sat, "with some frequency, in the audience as an alert and interested observer." *EEOC v. Pemco Aeroplex, Inc.*, No. **00-AR-2762-S**, slip. op. at 3.

case, and against Pemco as to the plaintiffs who had accepted offers of judgment.

Soon after, Pemco moved for summary judgment in the EEOC's suit, alleging that it was barred on the grounds of res judicata and collateral estoppel in light of the adverse verdicts in the *Thomas* suit. Pemco claimed that the two suits addressed the same question – whether a racially hostile work environment pervaded the work atmosphere at Pemco – and that the jury verdict answered this question in the negative. Pemco also argued that the EEOC was in privity with the twenty-two plaintiffs – and could therefore be bound by the verdict against them – essentially because EEOC attorneys attended the trial, participated in joint discovery, and met with plaintiffs' counsel on numerous occasions. The district court granted Pemco's motion, finding that the issues and the evidence in the EEOC's suit were "the same" as those in the *Thomas* case. *See EEOC v. Pemco Aeroplex, Inc.*, No. 00-AR-2762-S (N.D.Ala. Dec. 13, 2002). Without unambiguously finding privity between the EEOC and the private plaintiffs, the district court observed that the EEOC had the opportunity to participate in discovery in *Thomas*, and that EEOC counsel sat in on the *Thomas* trial as an "alert and interested observer." Slip op. at 3. The EEOC appealed.

II

The threshold issue in this case is whether the EEOC was in privity with the twenty-two private plaintiffs in the *Thomas* action. If they were not, then plainly the EEOC cannot be bound by the judgment in that case no matter how identical the claims or similar the evidence may have

been. Simply put, before the doctrines of either res judicata or collateral estoppel may be asserted against a party, it must be established that the party in the second action was either a party in the previous action or a privy of the party in that action. This principle is particularly important where the party in the second action is a governmental agency reposed with independent statutory power to enforce the law and having independent interests not shared by a private party.

In the case before us, we apply federal law, because "federal preclusion principles apply to prior federal decisions, whether previously decided in diversity or federal question jurisdiction." *CSX Transp., Inc. v. Brotherhood of Maint. of Way Employees,* 327 F.3d 1309, 1316 (11th Cir.2003). We have held that res judicata can be applied only if all of *four* factors are shown: "(1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action." *In re Piper Aircraft Corp.,* 244 F.3d 1289, 1296 (11th Cir.2001) (citing *Israel Discount Bank Ltd. v. Entin,* 951 F.2d 311, 314 (11th Cir.1992); *In re Justice Oaks II, Ltd.,* 898 F.2d 1544, 1550 (11th Cir.1990)). Likewise, in this Circuit, collateral estoppel can apply *only* "when the parties are the same (or in privity) [and] if the party against whom the issue was decided had a full and fair opportunity to litigate the issue in the earlier proceeding." *In re Southeast Banking Corp.,* 69 F.3d 1539, 1552 (11th Cir.1995) (citing *Allen v. McCurry,* 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); *In re St. Laurent,* 991 F.2d 672, 675 (11th Cir.1993)). If identity or privity of parties cannot be established, then there is no

need to examine the other factors in determining whether res judicata or collateral estoppel applies. Thus, if there was no privity between the EEOC and the *Thomas* plaintiffs, summary judgment was improvidently granted and the district court's order must be reversed.

We review a district court's order granting summary judgment *de novo*. *See Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1296 (11th Cir.2000). A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We also review *de novo* a district court's determination of res judicata or collateral estoppel. *See Jang v. United Techs. Corp*, 206 F.3d 1147, 1149 (11th Cir.2000). However, whether a party is in privity with another for preclusion purposes is a question of fact that is reviewed for clear error. *See Mesa Petroleum Co. v. Coniglio*, 787 F.2d 1484, 1489-90 (11th Cir.1986) (citing *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir.1968)).

This Circuit's preclusion standards reflect the long-standing and deep-rooted principle of American law that a party cannot be bound by a judgment in a prior suit in which it was neither a party nor in privity with a party. *See Martin v. Wilks*, 490 U.S. 755, 761-62, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n. 7, 99 S.Ct. 645, 649 n. 7, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443, 28 L.Ed.2d 788 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S.Ct. 1562,

1569, 23 L.Ed.2d 129 (1969); *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). As the Supreme Court has written, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." (footnote omitted). *Martin,* 490 U.S. at 762, 109 S.Ct. at 2184. "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards v. Jefferson County, Ala.,* 517 U.S. 793, 798, 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76 (1996) (quoting 18 C. Wright et al., *Federal Practice and Procedure* § 4449, at 417 (1981)). Pemco does not, and cannot, deny that the EEOC was not a party in the *Thomas* action. Therefore, the EEOC can only be bound by the result in that case if it was in privity with the plaintiffs in that case.

"Privity" is a flexible legal term, comprising several different types of relationships and generally applying when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. *Hansberry,* 311 U.S. at 41-43, 61 S.Ct. at 117-19. Adequate representation can arise in a number of circumstances. For example, "a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust." *Richards,* 517 U.S. at 798, 116 S.Ct. at 1766. The judgment in a class action may be binding on members of that class. *Hansberry,* 311 U.S. at 41-42, 61 S.Ct. at 117-118. Or, "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Martin,* 490 U.S. at 762 n. 2, 109 S.Ct. at 2184 n. 2 (citing *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 529-530 n. 10, 104 S.Ct.

1188, 1198 n. 10, 79 L.Ed.2d 482 (1984); *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)).

Obviously, none of these forms of privity are present in this case. As we see it, then, only two of the recognized types of privity are even remotely plausible here: the theory of "virtual representation," or "control" over the previous litigation. Although the district court never employed either of these terms in its order granting summary judgment, the relationship the district court and Pemco describe between the EEOC and the *Thomas* plaintiffs more closely resembles these two forms that privity may take. Other ways in which privity can be demonstrated – class representatives or trustee/beneficiary, for example – are obviously inapplicable. We therefore address the two types of privity that form the core of Pemco's argument. Our review of the record, however, suggests that neither virtual representation nor control over the previous litigation can be found in this case.

A. Virtual Representation

First, Pemco says that privity is present here because the *Thomas* plaintiffs' interests were so similar to those of the EEOC that they acted as the EEOC's virtual representatives. "Virtual representation" is a term of art that we have defined as applying "when the respective interests are closely aligned *and* the party to the prior litigation adequately represented those interests." *Delta Air Lines, Inc. v. McCoy Rests., Inc.,* 708 F.2d 582, 587 (11th Cir.1983) (citing *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.,*

546 F.2d 84, 100 (5th Cir.1977)) (emphasis added).[3] The doctrine of virtual representation provides in essence that "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-Gen. Corp. v. Askew,* 511 F.2d 710, 717 (5th Cir.1975).[4] Whether a party is a virtual representative of another is a question of fact. *Mesa Petroleum,* 787 F.2d at 1489-90 (citing *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir.1968).

We have employed four factors in determining whether there is virtual representation: whether there was "participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties." *Jaffree v. Wallace,* 837 F.2d 1461, 1467 (11th Cir.1988) (quoting 18 Wright & Miller, *Federal Practice & Procedure* § 4457, at 494-99) (alteration in original). All of these factors need not be found to meet the virtual representation standard,

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[3] Technically, the *Delta* panel was not entirely clear whether this was its specific definition of "virtual representation," or whether it was denoting characteristics that applied for a number of concepts of preclusion, of which virtual representation was only one. *See Delta,* 708 F.2d at 587 ("Under res judicata doctrines such as 'virtual representation,' a litigant may be precluded from litigating an issue based on a prior lawsuit in which, although he was not a party, his interests were represented by a party. This principle applies, however, only when the respective interests are closely aligned and the party to the prior litigation adequately represented those interests." (citation omitted)). However, a later decision in this Circuit quoted this language as specifically defining virtual representation. *Jaffree v. Wallace,* 837 F.2d 1461, 1467 (11th Cir.1988).

[4] The Eleventh Circuit has adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

nor is it necessarily enough that one of them is found; rather, we examine them in concert to determine whether there is virtual representation.

As for the first factor, the EEOC "participated" in the first litigation only in the sense that it conducted discovery jointly, met with private plaintiffs' counsel, and attended (but did not and could not participate in) part of the trial. Specifically, the EEOC took part in discovery after the district court allowed *joint* discovery in both cases. EEOC representatives also participated in mediation with the plaintiffs when Pemco sought an overall resolution to both actions and refused to mediate in *Thomas* unless EEOC also agreed to participate in the mediation. The parties disagree over how much time an EEOC attorney spent sitting in the courtroom during the *Thomas* trial and how often they conferred with the *Thomas* plaintiffs' counsel. But, most notably, the EEOC was not a party and there is no indication that it took the lead in the litigation, was heard at all during the trial, or served in anything other than an advisory capacity to the plaintiffs. The EEOC's representatives did not sit at counsel's table, attend every day of the trial, examine any witnesses, proffer any evidence, or exert any control over the plaintiffs' decisions. Indeed, the EEOC had no power to decide which claims the plaintiffs could assert, nor could it or did it decide how to argue the *Thomas* case, nor did it have any authority to settle or refuse to settle that suit. Finally, the EEOC had no authority to decide whether any appeal should be taken from the adverse judgments in the *Thomas* case.

Overall, these factors do not warrant a finding of virtual representation. Indeed, this finding is altogether consonant with the result reached in *South Central Bell Tel. Co. v. Alabama,* 526 U.S. 160, 119 S.Ct. 1180, 143

L.Ed.2d 258 (1999), where the Supreme Court found that privity did not exist even when the plaintiffs in the two cases shared the same *lawyer.* 526 U.S. at 168, 119 S.Ct. at 1185; *see also Sec'y of Labor v. Fitzsimmons,* 805 F.2d 682, 691-94 (7th Cir.1986) (*en banc*) (finding that there was no privity even though the Secretary of Labor had taken part in a joint discovery with the plaintiffs in the prior action; had intervened to object to the settlement in the private action; and the private litigants had statutorily been required to provide notice of their suit to the Secretary).

In the second place, the EEOC plainly did not "consent to be bound" by the judgment in the litigation in which in was not allowed to be a party. There is no indication anywhere in the record that the EEOC ever agreed to drop its case if the private plaintiffs lost their case against Pemco, or, for that matter, if the individual plaintiffs won.

The third factor is "tactical maneuvering," which has been described as "maneuvering to avoid preclusion." 18A Wright & Miller, *Federal Practice & Procedure* 2d § 4457, at 544-45 (2003). The EEOC did no such thing; indeed, it tried repeatedly to get *into* the earlier litigation, a move which, if successful, would obviously have barred it from asserting the same or similar claims later. In fact, it has been suggested that for there to be a finding that tactical maneuvering occurred, "it is not enough that a nonparty deliberately resisted inclusion in the earlier litigation." *Id.* at 545 (citing *Bogenholm v. House,* 388 N.W.2d 402, 407 & n. 5 (Minn.App.1986)). So it would be truly anomalous to find tactical maneuvering when a party vigorously sought but was prevented from being included in the earlier litigation. Furthermore, "tactical maneuvering" by the *opposing* party to create preclusion may be a powerful indicator that virtual representation should not be found

to exist. *See id.* (citing *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343 (2d Cir.1995)). Pemco arguably did just that, by trying to keep the EEOC as a party out of the original *Thomas* litigation and then pushing to preclude it from bringing its own suit.

The fourth factor, "close relationships between the parties and nonparties," has been described by a panel of the former Fifth Circuit as requiring "an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir.1978). In that case, the Court listed examples of such relationships as "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee." *Id.* at 1008-09 (quoting *Southwest Airlines Co.*, 546 F.2d at 97). The *Pollard* Court's list of "close relationships" consists of legal relationships involving a significant degree of accountability or control by one party over the other. Plainly, the relationship between the EEOC and individual plaintiffs on whose behalf they act does not have any of these traits.

So of the four factors that could establish virtual representation, three are clearly absent and one (participation in the original litigation) is only barely present. Thus, not surprisingly, we conclude that the *Thomas* plaintiffs were not the virtual representatives of the EEOC, a finding that is further supported by our holding in *Dills v. City of Marietta, Ga.*, 674 F.2d 1377 (11th Cir.1982). In *Dills*, a panel of this Court refused to back away from what it described as *Pollard*'s basic holding that "the doctrine of virtual representation require[s] an express or implied legal relationship in which parties to

the first suit are *accountable to non-parties* who file a suit raising identical issues." *Id.* at 1379 (internal quotation marks omitted) (emphasis added). Thus, if the party to the prior litigation was not legally accountable to the party in the latter, then virtual representation cannot be present, regardless of any other factor. Applying this standard, it is clear enough that the EEOC and the original private plaintiffs had no such connection. The private plaintiffs who sued Pemco were in no way legally accountable to the EEOC, they were not under the EEOC's control, and the EEOC had no power to require them to do anything. In short, we think there is little question that the *Thomas* plaintiffs were not virtual representatives of the EEOC.

Other cases relied upon by Pemco are plainly different. In urging the trial court to find privity, Pemco cited the Eleventh Circuit's decision in *NAACP v. Hunt,* 891 F.2d 1555 (11th Cir.1990). In *Hunt,* a panel of this Court found that a challenge to the constitutionality of Alabama's practice of flying the Confederate flag on top of the state capitol was precluded by an adverse judgment in a similar suit brought thirteen years earlier. The original plaintiff and the later plaintiffs were both state legislators and members of the NAACP, and we found that the interests of the original plaintiff were "so closely aligned to the NAACP's interests in the original suit that he was their virtual representative." *Id.* at 1561.

There are several powerful differences between this case and *Hunt,* however. First, *Hunt* applied Alabama's law of preclusion rather than federal preclusion law. *Id.* at 1560. And federal privity principles, as detailed above, employ a discernibly higher standard than the Alabama law applied in *Hunt.* Moreover, the Supreme Court's post-*Hunt* decisions in *Richards* and *South Central Bell* both

narrowed Alabama's preclusion law, reversing Alabama Supreme Court holdings that preclusion applied.

In addition, *Hunt* involved a general public law issue that affected the plaintiffs' private interests only indirectly, unlike the alleged racial harassment at Pemco. The Supreme Court has explicitly distinguished between such generalized public law challenges and more individualized cases, suggesting that there is less preclusion protection for a plaintiff who "complain[s] about an alleged misuse of public funds, or about other public action that has only an indirect impact on his interests." *Richards,* 517 U.S. at 803, 116 S.Ct. at 1768 (citations omitted). Indeed, the Supreme Court has suggested that in cases involving broad public interest matters, "we may assume that the States have wide latitude to establish procedures . . . to limit the number of judicial proceedings that may be entertained," as opposed to suits in which individual interests are clearly and directly implicated. *Id.*[5]

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[5] Pemco's argument that the EEOC's interests were adequately represented by the private litigants also relies on *Petit v. City of Chicago,* No. 90-C-4984, 1999 WL 66539 (N.D.Ill., Feb.8, 1999), an unreported case in which a district court found that a suit challenging a city's sergeant qualifying exam as racially discriminatory was estopped because of a previous suit bringing the same claim. *Id.* at *8. The court noted that there was privity because "[a]lthough not all the plaintiffs were parties to [the previous case], 19 of the present plaintiffs were plaintiffs in [that case], the same attorney represents the plaintiffs in both cases, and the prior history of consolidated discovery means that the available evidence regarding past discrimination is the same for both cases." *Id.* at *5. This was purely dicta, however, because the plaintiffs had made no privity argument and therefore waived that legal issue. *Id.* Moreover, the *Thomas* plaintiffs used non-EEOC lawyers; the EEOC's interests and legal responsibilities are wholly distinct from those of the private plaintiffs; and there is no indication that any of the *Petit* plaintiffs had tried and failed to join the earlier

(Continued on following page)

In short, we can find no support for the suggestion that the *Thomas* plaintiffs were "virtual representatives" of the EEOC in this case, and therefore conclude that it would have been clearly erroneous to impute privity to the parties on this basis.

B. Control

Analytically separate from a finding of virtual representation, the EEOC could still be found in privity with a private party if it effectively *controlled* the private party's litigation. However, in this case, such control is even less evident than virtual representation. In *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), the Supreme Court held that preclusion principles applied to the federal government, barring it from bringing suit against the state of Montana when a previous similar suit by a private contractor had been adjudicated on its merits. The Court found privity between the federal government and a private contractor when:

> The Government has stipulated that it:
>
> (1) required the [original] lawsuit to be filed;
>
> (2) reviewed and approved the complaint;
>
> (3) paid the attorneys' fees and costs;
>
> (4) directed the appeal from State District Court to the Montana Supreme Court;
>
> (5) appeared and submitted a brief as *amicus* in the Montana Supreme Court;

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suit against the city, as the EEOC tried to consolidate its action with the private action against Pemco.

> (6) directed the filing of a notice of appeal to this Court; and
>
> (7) effectuated [the plaintiff]'s abandonment of that appeal on advice of the Solicitor General.

Id. at 155, 99 S.Ct. at 974. Under these peculiar circumstances, the Supreme Court found that the United States "plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.*

In this case, the EEOC did not control the *Thomas* proceedings. It could not and did not require the original lawsuit to be filed. It did not hire or pay the private plaintiffs' attorneys, fees, and costs, and the EEOC never directed the *Thomas* plaintiffs to file or abandon their suit or, for that matter, do anything else. Nor did the EEOC direct the filing of a notice of appeal to this Court, or otherwise require the *Thomas* plaintiffs to abandon their claims. In short, there is no comparison between the control the government exerted over the private litigation prior to the *Montana* case and the role the EEOC played in the *Thomas* action. As far as we can tell, no panel of this Court has ever before found privity between a governmental agency and private citizens due to the agency's control over the private citizens' suit. This case would not be a good place to start.

C. Independent Agency Authority

We add that it is particularly rare to find privity between a private party in one action and a party in a later action when the party in the later action is a governmental agency. It is a "well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal

statute that implicates both public and private interests." *Herman v. South Carolina Nat'l Bank,* 140 F.3d 1413, 1425 (11th Cir.1998). Indeed, if we were to hold that there was privity between the *Thomas* plaintiffs and the EEOC due to virtual representation or control, it would be the first time this Court has ever found this kind of privity between a governmental agency and the private plaintiffs in a prior action. As the Seventh Circuit has put it, "[t]he Government is not barred by the doctrine of *res judicata* from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded." *Secretary of Labor v. Fitzsimmons,* 805 F.2d 682, 692 (7th Cir.1986) (*en banc*). Moreover, most Supreme Court cases addressing the subject have found that governmental agencies were not bound by the final judgment in a private suit similar to the one they were bringing. *See Hathorn v. Lovorn,* 457 U.S. 255, 268 n. 23, 102 S.Ct. 2421, 2430 n. 23, 72 L.Ed.2d 824 (1982); *City of Richmond v. United States,* 422 U.S. 358, 373 n. 6, 95 S.Ct. 2296, 2305 n. 6, 45 L.Ed.2d 245 (1975); *Sam Fox Publ'g Co., Inc. v. United States,* 366 U.S. 683, 689-90, 81 S.Ct. 1309, 1313, 6 L.Ed.2d 604 (1961).

Quite simply, it is so unusual to find privity between a governmental agency and private plaintiffs because governmental agencies have statutory duties, responsibilities, and interests that are far broader than the discrete interests of a private party. In *United States v. East Baton Rouge Parish Sch. Bd.,* 594 F.2d 56 (5th Cir.1979), the former Fifth Circuit explained this principle in these terms:

> [T]he district court's conclusion [that the private plaintiffs and the United States were identical] is

> directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. This principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees."

Id. at 58 (quoting *United States v. Raines,* 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)) (citations omitted). It is precisely this public interest function that distinguishes governmental agencies from private litigants, and the EEOC is certainly no exception to the principle that these agencies have responsibilities with a scope far beyond the legal interests of individual plaintiffs.

In fact, as the Supreme Court has observed about the statutory responsibilities of the EEOC:

> Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by "the overriding public interest in equal employment opportunity ... asserted through direct Federal enforcement." When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.

General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326, 100 S.Ct. 1698, 1704, 64 L.Ed.2d 319 (quoting 118 Cong. Rec. 4941 (1972)) (footnote omitted).

The EEOC has broad authority to enforce employment law as it sees fit, going beyond the rights of individual plaintiffs. As its authorizing statute says:

> The Commission shall have power –
>
> (1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;
>
> (2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;
>
> (3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;
>
> (4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;
>
> (5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;
>
> (6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

42 U.S.C.A. § 2000e-4(g). All of these powers extend far beyond the authority given to individual aggrieved plaintiffs. The enforcement provision of the Equal Employment Opportunities subchapter of the Federal Code says that "[t]he Commission is empowered, as hereinafter provided, to prevent *any* person from engaging in *any* unlawful employment practice." *Id.* § 2000e-5(a) (emphasis added). If conciliation efforts between an employer and employees fail, the EEOC may also seek classwide relief without being certified as a class representative under Fed. R. Civ. Pro. 23. *See id.* § 2000e-5(f)(1); *Gen. Tel. Co.*, 446 U.S. at 320, 100 S.Ct. at 1701; *see also id.* § 2000e-5(b)-(g) (detailing the EEOC's enforcement powers and the types of relief it may obtain pursuant to its statutory authority). Or, as the Seventh Circuit has put it, "[t]he EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation rather than pocketing the money itself and putting them to the bother of suing separately." *In re Bemis Co., Inc.*, 279 F.3d 419, 421 (7th Cir.2002). In this case, the EEOC has convincingly established that its enforcement role is incompatible with a finding that its authority to bring an enforcement action is barred by a judgment in a private suit.

We add that the courts have concluded that the EEOC may proceed with an enforcement action even where the charging party's action has been resolved. Recently, in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), the Supreme Court held that the charging party's agreement to arbitrate claims did not limit the EEOC's authority to bring suit, although it was still "an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or

the character of relief the EEOC may seek." *Id.* at 297, 122 S.Ct. at 766. In addition, the former Fifth Circuit has held that "after the termination of a charging party's private suit the EEOC can bring suit predicated on, but not limited to, the same charge." *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 454 (5th Cir.1975). In that case, the previous suit had been voluntarily dismissed with prejudice. *Id.*

Still other courts have reached similar results, rejecting preclusion of EEOC suits because of prior private actions against the same defendants. *See New Orleans Steamship Ass'n v. EEOC*, 680 F.2d 23, 25 (5th Cir.1982) ("[T]he EEOC may challenge a transaction which was the subject of prior judicial scrutiny in a private suit, if the subsequent challenge seeks different relief."); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361-62 (6th Cir.1975) (holding that the EEOC was not privy to a private settlement); *see also EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir.1993) (holding that there was no privity between a single plaintiff and the EEOC *acting solely on his behalf* insofar as the relief the EEOC sought was not individual damages and reinstatement but rather an injunction against further violation); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-43 (9th Cir.1987) (same).

If the EEOC may pursue action on behalf of a sole person whose private suit has been resolved, then it would be truly anomalous to hold that the EEOC could be barred from bringing action here, when it is acting on behalf of many people who were not parties at all in the previous action. The opposite is equally true; resolution of an EEOC case does not necessarily bar private suit from the person on whose behalf the EEOC originally acted. Even when

the EEOC's sole basis for suit is the allegations of one individual, final judgment on that claim does not bar her from suing privately in this Circuit. In *Riddle v. Cerro Wire and Cable Group, Inc.*, 902 F.2d 918 (11th Cir.1990), an employee was unsatisfied with a consent degree agreed upon by the EEOC, acting on her behalf, and her employer. She thus filed her own Title VII suit, and her employer argued that res judicata barred her action. The district court agreed and granted summary judgment, but a panel of this Circuit reversed, finding that there was no privity. *Id.* at 922-23. We reached this result even though "the EEOC's suit against Cerro was based solely on Riddle's charge of discrimination; it did not involve a class of employees or an allegation of pattern and practice discrimination," and the consent decree "specifically provided personal relief for Riddle." *Id.* at 922.

Again, the Court articulated how the interests of the individual plaintiff and the EEOC differ:

> The EEOC is primarily interested in securing equal employment opportunity in the workplace. That interest is often most completely advanced through conciliation agreements or consent decrees of the kind involved in this case, where the employer agrees to take broad remedial steps to eradicate discrimination. The aggrieved individual, on the other hand, is primarily interested in securing specific personal relief of the kind Riddle is seeking in her private action against Cerro.

Id. at 922-23. Although the suits against Pemco also differ insofar as the private suit came first, that fact makes the case for a finding of privity even weaker. After all, since the EEOC is capable of seeking *broader* relief than an individual plaintiff may achieve, if there is no privity

when the narrower suit follows the broader claim, it makes no sense for there to be privity when the broader suit comes later. In addition to the EEOC's own broad mandate, there are also 165 or more African-American employees of Pemco who did not participate in the original suit (though they might have been covered by it had the plaintiffs not dropped their class action due to Pemco's opposition).

Urging us not to follow the precedents working against it, Pemco argues that this is a case of first impression because the private suit was ended with a jury verdict, while most of the other relevant previous cases involving the EEOC were settled or arbitrated. Pemco points particularly to *Huttig Sash,* which was voluntarily dismissed, and in which the court, in denying privity, warned that "an employer might seek to settle a particular individual's grievance in order to prevent the EEOC from bringing suit on other discriminatory practices discovered in investigating the original charge." *Huttig Sash,* 511 F.2d at 455. Pemco appeals to this concern to highlight the fact that it may be less of a worry when the prior action is resolved by a jury verdict rather than by mutually agreed-upon settlement. However, a similar danger exists even when the prior action is fully contested to a jury verdict, because the private plaintiffs might have fewer resources, less experienced or able attorneys, or weaker legal claims than does the EEOC.

As this review of the case law makes abundantly clear, the overwhelming weight of precedent in this Circuit and elsewhere weighs heavily against finding privity between the EEOC and the private plaintiffs. The EEOC's comprehensive mandate and authority to petition for broad injunctive and pecuniary relief stands in stark contrast to

the interests of individual plaintiffs in employment actions.

Finally, our holding is particularly warranted in light of the equities of this case, which weigh strongly against a finding of privity. As Justice Stone put it, "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940) (citing *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1877)). Pemco did its best to keep the EEOC out of the original litigation, objecting strenuously that allowing it in as a party would create an unduly burdensome trial and "powerfully" prejudice the defendant. Now Pemco is trying to bind the EEOC to the adverse result in the suit that it successfully kept the EEOC from participating in. That result would, we think, set a grossly inequitable precedent: it would open the door for defendants to seek to keep the EEOC out of private litigation, and then try to preclude the EEOC – which may have more resources and effective legal representation, and therefore a better chance of winning at trial, than private plaintiffs do – from suing on its own. Allowing the resolution of a private suit to bar a federal agency's separate action "would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention." *East Baton Rouge Parish Sch. Bd.,* 594 F.2d at 58 (footnote omitted). This could severely curtail the enforcement powers of the EEOC and other governmental agencies by allowing the dismissal of their cases due to the result of

litigation over which they have no control. In this case the result we reach is not difficult because we can find neither the indicia of "virtual representation" nor those of "control."

In short, we are persuaded that the district court clearly erred in finding privity between the EEOC and the *Thomas* plaintiffs. Moreover, it seems to us wholly inequitable to hold the EEOC bound by the result in a case that it was not allowed to take part in. Because there is no privity between the parties, we need not and do not examine the other factors necessary to find res judicata or collateral estoppel. The district court, in entering judgment against the EEOC, noted wryly that "[a]fter a sufficient number of battles, even the Hatfields and McCoys put down their guns." Slip op. at 7. In this case, however, the district court erroneously prevented the McCoys from picking up their guns in the first place.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	00-AR-2762-S
PEMCO AEROPLEX, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Dec. 13, 2002)

The court has for consideration the motion of defendant, Pemco Aeroplex, Inc. ("Pemco"), for summary judgment. Pemco seeks a dismissal of the above-entitled action which was brought by the Equal Employment Opportunity Commission ("EEOC") on behalf of all of Pemco's black employees and former employees. The complaint alleges that Pemco subjected its black employees to a racially hostile work environment.

The EEOC attempts to accomplish what 36 black plaintiffs in *Thomas, et al. v. Pemco Aeroplex, Inc.*, CV-99-AR-3280-S ("*Thomas*"), an action recently concluded in this court, failed to accomplish. After the EEOC filed its above-entitled action, it sought to have it consolidated with *Thomas* on the ground that the two cases involved *the* same issues and evidence. Although this court agreed that the issues were the same and that the evidence would be the same in both cases, it denied full consolidation because of the severe logistical problems in managing a trial of the anticipated size of the cases if tried together.

Individual verdicts and judgments would have been necessary to address the unavoidably discrete claims of a large number of individuals. The court did order consolidation of the two cases for the purposes of discovery, and thereafter the EEOC was allowed to participate fully in the joint discovery. After discovery had been closed in both cases, the EEOC again moved for a consolidation for trial. The court again denied the motion for the same reasons that it had earlier denied it.

By the time of the *Thomas* trial, the. number of plaintiffs had been reduced from 36 to 22. The complaints of 14 plaintiffs had been disposed of either by plaintiffs' acceptances of Rule 68 offers by Pemco or by dismissals for failure to list claims as assets in individual bankruptcy proceedings. The 22 black employees who actually went to trial claimed that they had been constantly subjected to a racially hostile work environment from June 3, 1992, until the date of trial. They were represented by competent and dedicated counsel, who had diligently engaged in the extensive and expensive discovery in which the EEOC had also participated. After a month long trial, a nine person jury, which included three black jurors, in response to special interrogatories found that there had been no racially hostile environment at Pemco during the period under examination. Accordingly, this court entered a final judgment in favor of Pemco on July 1, 2002. Concluding that it was bound by the jury's finding that there had been no racially hostile environment at Pemco, the court denied plaintiffs' requests for equitable relief and entered a final, appealable judgment in favor of Pemco. No appeal was taken.

The only question presented by Pemco's pending Rule 56 motion is whether or not the final judgment in *Thomas*

has preclusive effect and is dispositive of the issues in the EEOC's parallel case. The court will not engage in an academic discussion of the nice distinctions between issue preclusion and claim preclusion, or the distinctions between *res judicata* and collateral estoppel. Rather, the court proceeds on the broad assumption that questions of disputed fact that have been fully and fairly tried between the same parties or their privies in a case in which a final resolution has been reached by judgment, cannot, in the name of good sense and judicial economy, be tried again. In the case at bar, the applicability of this universally recognized and accepted principle boils down to whether or not the EEOC, and the Pemco employees and former employees it now undertakes to represent, are in sufficient privity with the plaintiffs in *Thomas* to apply this principle.

In *Thomas,* not only did the EEOC have the right to participate in discovery, but it availed itself of that right. The fact that it did not engage in the examination of every deponent and often deferred to counsel for the *Thomas* plaintiffs, is not a controlling fact. Although the EEOC's counsel did not sit at the counsel table while Thomas was being tried, she did, with some frequency, sit in the audience as an alert and interested observer.

Very revealing is footnote 5 in the EEOC's brief filed in opposition to Pemco's motion for summary judgment. There, the EEOC says:

> The individuals whose claims were resolved in the *Burnes* [*Thomas*] case (both those who received favorable judgments and those who received unfavorable judgments) **were and remain technically members of the group for which the Commission seeks relief** . . .

(emphasis supplied).

These words can have only one meaning, namely, that the EEOC contends that through its efforts in this case it is still possible for the 36 original *Thomas* plaintiffs to obtain relief against Pemco in this case, despite the indisputable *fact* that the 36 are foreclosed by the final judgments entered against them or in their favor. The said judgments were either unsuccessfully appealed or were not appealed.

The court finds it impossible to conceive of the existence of witnesses who realistically could add anything to a trial in the EEOC's case, and who were not called in *Thomas*, and few, if any, incidents or events that were not thoroughly, even agonizingly, explored in *Thomas*. The core factual dispute, i.e., whether or not a pervasively hostile racial environment existed at Pemco during the relevant time period, was tried to the hilt in *Thomas*.

The EEOC's secondary argument that National Railroad *Passenger v. Morgan*, ___ U.S. ___, 122 S.Ct. 2061 (2002), has materially altered the scope of the inquiry, and distinguishes *Thomas* from this case, was obviated by the happy accident that the Supreme Court's decision in *National Railroad* came down while *Thomas* was being tried. *National Railroad* was actually raised as a guide by this court in that case. The jury in *Thomas* was allowed to hear evidence of events that took place long before some of the 36 plaintiffs were even employed by *Pemco*. Whatever environment existed when Pemco's predecessor operated the business operated by Pemco, at the same location, with many of the same employees, was and still is too remote for judicial inquiry. There has been no suggestion by the EEOC that Pemco assumed the liability for possible ancient violations of Title VII committed by the former employer of these or other black employees.

During oral argument on Pemco's motion for summary judgment, the court asked counsel for the EEOC how many of Pemco's black employees and former employees are in the class it represents in this case. Counsel answered that the number is approximately 200. This ostensibly includes the 36 plaintiffs in *Thomas*. The court then asked counsel how the court should go about compensating each individual Pemco employee and former employee for the effects of a hostile work environment if a hostile work environment existed. Counsel answered that the trial should proceed in two stages: the first should consist of a trial and submission to the jury of the single question of whether or not a hostile environment ever existed (the very question decided in *Thomas*); the second (if the jury should decide that a hostile environment existed) should consist of a series of mini-trials in which the jury would decide each employee's separate claim of damages. This court spent a month presiding over the *Thomas* trial in which 22 employees jointly claimed that Title VII had been violated by Pemco, but claimed separately for their alleged individual injuries proximately caused by that violation. The EEOC now wants to have the issue of Title VII liability re-adjudicated, and if successful, then to try to the same jury 200 individual discrete claims for damages. This idea overlooks several important considerations besides the overwhelming over-exploitation of judicial resources. The first is that individual compensable injury does not automatically flow from the existence of a hostile racial environment. A pervasively hostile environment must proximately cause injury to a single person in order to provide a basis for an award of damages to that person. Thus, not only is the EEOC asking that the amount of injury be tried 200 times, but the issue of the proximate causation of alleged injuries

would be tried 200 times. Different employees would not only have differing degrees of hurt, if hurt at all, but there would be different time periods of exposure to the obnoxious employer conduct. For instance, some of the EEOC's large class may have retired years ago, while others may have been promoted to supervisory positions at Pemco and be very happy employees. Second, Pemco, in theory, could have had 2,000 black employees and former employees instead of the EEOC's anticipated 200. After having recently tried 22 discrete claims to a jury, it boggles the court's mind to think of trying 200 individual claims, much less 2,000. What the EEOC suggests as the procedure for providing monetary relief for an unlimited number of quasi-class members, boggles the court's mind into incomprehension.

If the EEOC's description of the class it purports to represent had expressly excluded the 36 plaintiffs in *Thomas*, the issue of preclusive effect would be only slightly less difficult than it is. But, when the EEOC insists that it represents all of Pemco'a black employees, past and present, including the *Thomas* plaintiffs, the EEOC more loudly invites the application of a doctrine of preclusion.

The EEOC contends that it has a special status, and that by virtue of its statutory mandate it cannot be precluded by an adjudication in another case in which it was not a formal party. Carrying this idea to its logical or illogical conclusion, the EEOC's case could proceed **even if the named plaintiffs in *Thomas* had included every black employee and former black employee of Pemco.** If the EEOC is correct, it matters not whether all of its present clients, in their separate private actions, had already won or lost, because, according to the EEOC, it

represents a larger public interest. This court cannot find any public interest in such an outlandish expenditure of time and effort.

If the jury in *Thomas* had found that an environment hostile to blacks existed at Pemco, this court would have granted summary judgment in favor of the EEOC on the issue of hostile environment. If this had occurred, the court of course could not have avoided having to deal with the question of fashioning appropriate relief for 200 individuals. Pemco may not have agreed with the court's ruling in such a case, but the EEOC, on the other hand, probably would have been delighted. However, the question is academic. The court is now operating under known procedural circumstances and not in a vacuum. A qualified jury has actually found that no racially harassing environment existed at Pemco. The EEOC is, or should be, bound by that finding.

There simply must be an end to litigation. After a sufficient number of battles, even the Hatfields and the McCoys put down their guns. Although the EEOC wants to continue the fight on behalf of black employees and former employees, and, though the EEOC has the resources to do so, this court believes that the controversy has been fully and fairly tried and has been finally disposed of. The court, therefore, will enter an order granting Pemco's motion for summary judgment.

DONE this 13 day of December, 2002.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-10719-HH

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

PEMCO AEROPLEX, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed Dec. 23, 2004)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19__ ___ F.2d ___).

Before: MARCUS and WILSON, Circuit Judges, and DUPLANTIER*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

Honorable Adrian G. Duplantier, United States District Judge for the Eastern District of Louisiana, sitting by designation.

Supreme Court, U.S.
FILED
JUN 27 2005
OFFICE OF THE CLERK

(2)

No. 04-1292

In the Supreme Court of the United States

PEMCO AEROPLEX, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission is precluded from proceeding with a Title VII enforcement action alleging widespread racial harassment against petitioner's African-American employees merely because the individual harassment claims of some of petitioner's African-American employees were previously resolved by settlement or adverse judgment in a non-class private suit against petitioner.

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In the Supreme Court of the United States

No. 04-1292

PEMCO AEROPLEX, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 383 F.3d 1280. The opinion of the district court (Pet. App. 27-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2004. A petition for rehearing was denied on December 23, 2004 (Pet. App. 35-36). The petition for a writ of certiorari was filed on March 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an Alabama corporation engaged in the business of maintaining and repairing military airplanes. On December 9, 1999, 36 African-American employees brought suit in United States District Court for the Northern District of Alabama, alleging that petitioner violated 42 U.S.C. 1981 by subjecting them to racial harassment and other discrimination. See *Thomas* v. *Pemco Aeroplex*, No. CV-99-AR-3280-S. Although the suit was initially brought as a class action, plaintiffs withdrew their class claim after Pemco opposed certification, and plaintiffs prosecuted the case as 36 individual claims consolidated into a single action. Pet. App. 2.

In the meantime, the Equal Employment Opportunity Commission (EEOC) was investigating multiple charges of race discrimination at petitioner's facilities, dating back to the late 1980s. In September 2000, the EEOC brought this Title VII enforcement action under the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that petitioner had subjected all of its 200 or more African-American employees to a racially hostile work environment during the 1990s. The EEOC sought injunctive relief and monetary compensation for these employees. The EEOC's suit was assigned to the same judge who was presiding over the private individual cases. Pet. App. 2-3.

Thereafter, the EEOC moved twice to consolidate its enforcement action with the private cases, once immediately after filing suit and again after discovery ended in the private cases. Petitioner vigorously opposed both motions, arguing that consolidation would cause the company extreme prejudice. Specifically, petitioner

argued that, whereas the EEOC had alleged a single Title VII claim, the *Thomas* litigation involved dozens of individual plaintiffs, each with his or her own claims; thus, according to petitioner, much of the evidence of class-wide discrimination pertinent to the EEOC's suit would be irrelevant and prejudicial to the individual claims. Without explanation, the district court denied the motions to consolidate, although it granted the EEOC's request that discovery in either case could be used to the extent relevant in the other case. Pet. App. 3-4.

During discovery, EEOC attorneys attended most of the depositions of the *Thomas* witnesses and conferred with the *Thomas* attorneys on many occasions. In April 2002, after discovery ended in the *Thomas* litigation, nine of the *Thomas* plaintiffs accepted offers of judgment; the claims of several others had been dismissed on other grounds. The remaining 22 plaintiffs went to trial before a jury in June 2002. EEOC attorneys attended some of the trial but did not sit at counsel table, offer evidence, examine witnesses, or otherwise participate in the trial. Pet. App. 4; see *id.* at 28.

On June 26, 2002, in 22 separate verdicts, the jury found that none of the 22 *Thomas* plaintiffs had been subjected to a hostile work environment between December 9, 1997, and June 3, 2002—the only period the jury was asked to consider. Thereafter, the court entered judgment against those 22 plaintiffs and against petitioner as to the nine plaintiffs who had accepted offers of judgment. Pet. App. 4-5.

2. Petitioner then moved for summary judgment in EEOC's enforcement action, arguing that it was barred by res judicata and collateral estoppel in light of the adverse judgments in the private action. Petitioner now

claimed that EEOC's action and the *Thomas* litigation addressed the same question—whether a racially hostile work environment pervaded petitioner's work atmosphere. According to petitioner, the jury had answered that question in the negative. Petitioner also now argued that the EEOC was in privity with the *Thomas* plaintiffs, noting that EEOC attorneys attended the trial, participated in joint discovery, and met with plaintiffs' counsel on numerous occasions. Pet. App. 5.

The district court granted petitioner's motion. The court stated that the *Thomas* jury "found [in special interrogatories] that there had been no racially hostile environment at Pemco during the period under examination," which, according to the court, was the same as in EEOC's suit. Pet. App. 28, 30. The court also stated that the "core factual dispute"—that is, whether "a pervasively hostile racial environment existed at Pemco" during that time period—"was tried to the hilt in *Thomas*." *Id.* at 30. In the court's view, those issues and the evidence needed to prove them were "the same" as in EEOC's suit. *Id.* at 27.

Accordingly, the court stated, the issue "boils down to whether or not the EEOC and the Pemco employees and former employees it now undertakes to represent are in sufficient privity with the plaintiffs in *Thomas*" to preclude further litigation of EEOC's suit. Pet. App. 29. Without expressly finding privity, the court noted that the EEOC had the opportunity to participate in discovery in *Thomas* and that counsel for the EEOC "with some frequency" sat in the courtroom during the *Thomas* trial as "an alert and interested observer." *Ibid.* Further, the court noted that the EEOC did not rule out the possibility that it could seek relief for the *Thomas* plaintiffs "despite the indisputable fact that

[they] are foreclosed by the final judgments entered against them or in their favor." *Id.* at 30. The court concluded that a jury "found that no racially harassing environment existed at Pemco," and "[t]he EEOC is, or should be, bound by that finding." *Id.* at 33.

The court rejected the EEOC's contention "that by virtue of its statutory mandate it cannot be precluded by an adjudication in another case in which it was not a formal party" because "it represents a larger public interest." Pet. App. 32-33. The court reasoned that, "[c]arrying this idea to its logical or illogical conclusion, the EEOC's case could proceed even if the named plaintiffs in *Thomas* had included every black employee and former black employee of Pemco." *Id.* at 32. The court stated that it "cannot find any public interest" in what it termed "such an outlandish expenditure of time and effort." *Id.* at 33. Concluding, therefore, that "the controversy [had] been fully and fairly tried" and "finally disposed of" in *Thomas*, the court dismissed EEOC's enforcement action. *Ibid.*

3. The court of appeals reversed. The court identified the issue on appeal as "whether the [EEOC] may proceed with a Title VII enforcement action charging the defendant * * * with company-wide racial harassment, notwithstanding an adverse judgment rendered in a separate action brought by a number of individual plaintiffs who alleged racial harassment by the same defendant." Pet. App. 1. The court determined that the district court had misapplied the doctrines of collateral estoppel and res judicata in holding that the EEOC "was bound by the prior judgment even though the [EEOC's] suit covers employees who were not part of the earlier private suit and notwithstanding that the EEOC was twice denied the opportunity to consolidate its case with

the private suit." *Id.* at 2. Finding that the EEOC was not in privity with the private plaintiffs, the court held that EEOC's enforcement action could proceed. *Ibid.*

In reaching its conclusion, the court of appeals noted that Eleventh Circuit "preclusion standards reflect the longstanding and deep-rooted principle of American law that a party cannot be bound by a judgment in a prior suit in which it was neither a party nor in privity with a party," Pet. App. 7, and that the requirement of privity is "particularly important where the party in the second action is a governmental agency reposed with independent statutory power to enforce the law and having independent interests not shared by a private party," *id.* at 6. Thus, the court reasoned, the "threshold issue" is "whether the EEOC was in privity with the [*Thomas*] plaintiffs." *Id.* at 5. If not, the court concluded, "then plainly the EEOC cannot be bound by the judgment in that case no matter how identical the claims or similar the evidence may have been." *Id.* at 5-6.

According to the court, "only two of the recognized types of privity are even remotely plausible here: the theory of 'virtual representation,' or 'control' over the previous litigation." Pet. App. 9. Reviewing the record in this case, the court rejected both theories. The court concluded that it "can find no support for the suggestion that the *Thomas* plaintiffs were 'virtual representatives' of the EEOC in this case." *Id.* at 16. The court also found that "the EEOC did not control the *Thomas* proceedings," because it "did not require the original [*Thomas*] lawsuit to be filed," "did not hire or pay the private plaintiffs' attorneys," and "never directed the *Thomas* plaintiffs to file or abandon their suit or, for that matter, do anything else." *Id.* at 17.

The court of appeals stressed that it would be "particularly rare" to find privity when the party to be bound is a governmental agency. Pet. App. 17. It is "a well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." *Id.* at 17-18 (quoting *Herman* v. *South Carolina Nat'l Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998), cert. denied, 525 U.S. 1140 (1999). That is because governmental agencies such as the EEOC "have statutory duties, responsibilities and interests that are far broader than the discrete interests of a private party." *Id.* at 18. The court explained that EEOC's "enforcement role is incompatible with a finding that its authority to bring an enforcement action is barred by a judgment in a private suit." *Id.* at 21. Further, the court reasoned, "courts have concluded that the EEOC may proceed with an enforcement action even where the charging party's action has been resolved." *Id.* at 21 (citing, *inter alia*, *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002)). It would thus be "truly anomalous to hold that the EEOC could be barred from bringing action here, when it is acting on behalf of many people who were not parties at all in the previous action." *Id.* at 22. See *id.* at 24 ("In addition to EEOC's own broad mandate, there are also 165 or more African-American employees of Pemco who did not participate" in *Thomas*.).

Finally, the court of appeals focused on the "equities of this case, which weigh strongly against a finding of privity." Pet. App. 25. The court observed that "Pemco is trying to bind the EEOC to the adverse result in the suit that it successfully kept the EEOC from participating in." *Ibid.* In the court's view, any such result would

set a "grossly inequitable precedent: it would open the door for defendants to seek to keep the EEOC out of private litigation, and then try to preclude the EEOC—which may have more resources and effective legal representation, and therefore a better chance of winning at trial, than private plaintiffs do—from suing on its own." *Ibid.* Permitting such tactics would "severely curtail the enforcement powers of the EEOC and other governmental agencies by allowing the dismissal of their cases due to the result of litigation over which they have no control." *Id.* at 25-26.

ARGUMENT

The court of appeals held that the EEOC may "proceed with a Title VII enforcement action charging the defendant * * * with company-wide racial harassment, notwithstanding an adverse judgment rendered in a separate action brought by a number of individual plaintiffs who alleged racial harassment by the same defendant." Pet. App. 1. That holding is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. In *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), this Court held that the EEOC may litigate a claim of disability discrimination and seek victim-specific relief for an alleged victim of that discrimination even if the individual, having agreed to arbitrate his private claim against his employer, could not seek such relief in court himself. The Court reasoned that the EEOC's claim is not "merely derivative" of claims brought by private plaintiffs, nor is the EEOC "merely a proxy for the victims of discrimination." *Id.* at 297 (citing *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980)). Rather, Title VII authorizes the EEOC to bring its own

suit and to allege its own claim, which is separate from and independent of private claims challenging similar conduct by an employer; the statute "clearly makes the EEOC the master of its own case." See *id.* at 291. The Court recognized that, even when it sues seeking victim-specific relief, "it is the public agency's province * * * to determine whether public resources should be committed to the recovery of victim-specific relief." *Id.* at 291-292. "[I]f the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum." *Id.* at 292.[1]

Petitioner argues (Pet. 4) that the Eleventh Circuit's decision "conflicts" with this Court's decision in *Waffle House*. The Court in *Waffle House* stated that a plaintiff's conduct "may have the effect of limiting the relief that the EEOC may obtain in court" and the court directed federal courts to preclude "double recovery by an individual." 534 U.S. at 296, 297 (quoting *General Tel.*

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[1] This Court and others have held in a variety of other contexts that private suits do not preclude federal agencies with enforcement powers from bringing factually related claims. See, *e.g.*, *City of Richmond* v. *United States*, 422 U.S. 358, 373 n.6 (1982) (prior appellate judgment in Voting Rights Act case is not given estoppel effect in later suit by United States); *Herman* v. *South Carolina Nat'l Bank*, 140 F.3d 1413, 1424-1425 (11th Cir. 1998) (Department of Labor not precluded from pursuing an ERISA claim despite a prior private suit), cert. denied, 525 U.S. 1140 (1999); *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (same; holding that "Government is not barred by the doctrine of res judicata from maintaining independent actions to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded"); *Donovan* v. *Cunningham*, 716 F.2d 1455, 1462-1463 (5th Cir. 1983) (same), cert. denied, 467 U.S. 1251 (1984); *United States* v. *East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979) (Department of Justice not precluded from pursuing Voting Rights Act violation by prior resolution of a private claim).

Co., 446 U.S. at 333). Petitioner asserts (Pet. 5) that the decision in this case "allows the EEOC to obtain relief for the * * * *Thomas* plaintiffs," and that permitting such relief is inconsistent with *Waffle House*.

Nothing in the Eleventh Circuit's decision suggests any conflict with *Waffle House*. The Court in *Waffle House* did note that a charging party's "conduct may have the effect of limiting the relief that the EEOC may obtain in court." 534 U.S. at 296. But the Court also noted that "no question concerning the validity of [the charging party's] claim or the character of the relief that could be appropriately awarded in * * * a judicial * * * forum is presented by th[e] record" in *Waffle House*. *Id.* at 297. As the Court stated, "[i]t is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." *Ibid.* Similarly here, the court of appeals held that EEOC's enforcement action was not barred by the judgments in *Thomas*. As in *Waffle House*, questions of relief were neither presented to nor resolved by the court of appeals. See note 2, *infra*. This case accordingly presents no conflict with *Waffle House* on questions of relief.

2. Petitioner contends (Pet. 5) that further review is warranted to address what it contends is a conflict in the circuits on the question of "whether the EEOC is bound by a plaintiff's prior settlement and/or verdict when seeking the same relief on behalf of that individual."

a. This case does not present the question of whether the EEOC is precluded from bringing a Title VII enforcement action where the agency is seeking "the same relief" (Pet. 5) as was sought in a private suit. The EEOC in this case alleged company-wide racial harassment potentially affecting all of petitioner's 200 or more

African-American employees; the vast majority of those employees did not participate in *Thomas*. Although the *Thomas* suit was initially brought as a class action, plaintiffs withdrew their class claim after petitioner opposed class certification and proceeded on "individual plaintiffs consolidated in one action," each focused on relief for that particular plaintiff. Pet. App. 2. Thus, in addition to injunctive relief, the EEOC's suit seeks victim-specific relief for approximately 165 African-American employees who were not included in the *Thomas* suit and could not have obtained any relief from that suit no matter what the jury there had found. There is no theory under which the *Thomas* litigation would preclude litigation by those 165 individuals and no sound reason why the EEOC cannot litigate to vindicate the rights of those individuals.[2]

The courts of appeals are not divided on the question presented in this case. In the context of EEOC suits to enforce Title VII, the courts of appeals even before *Waffle House* had uniformly held that, at least where, as here, the allegations in an EEOC enforcement action are broader than those in a private suit based on the same charge, the EEOC is not bound by the resolution of the

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[2] In light of the procedural posture of this case, the Eleventh Circuit did not address the question whether and under what circumstances any of the *Thomas* plaintiffs could benefit from EEOC's enforcement action if and when liability is established. EEOC's action was dismissed even before discovery was complete. Compare Docket entry No. 52 (9/10/02 order extending discovery in EEOC's suit until 12/31/02), with Pet. App. 27 (granting summary judgment on 12/13/02). Assuming the trial is bifurcated, matters relating to relief may be deferred until after the trial on liability. At that time, should the EEOC prevail on the merits and decide to seek victim-specific relief for any *Thomas* plaintiff in addition to other injured African-American employees, petitioner will have ample opportunity to litigate that issue.

private suit such that its enforcement action may not proceed. See, *e.g.*, *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000) (decision in private suit to which EEOC is not a party "will not formally preclude the EEOC" in its parallel action), cert. denied, 531 U.S. 1127 (2001); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (EEOC may proceed in suit under Title VII and obtain injunctive relief even though charging party's claim for victim-specific relief was moot); *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975) (after termination of charging party's private suit, EEOC may bring its own suit predicated on, but not limited to, the same charge); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361-1362 (6th Cir.) (same, adding that EEOC is not "privy" to private settlement to which it did not agree), cert. denied, 423 U.S. 994 (1975); cf. *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (ADEA case; EEOC may proceed with its suit on behalf of single individual and obtain injunctive relief even though individual was barred by prior suit from seeking victim-specific relief). Like the decision in this case, those cases recognize that precluding an EEOC enforcement action under such circumstances would be contrary to the key role Congress envisioned that the EEOC would play in enforcing federal discrimination law. See, *e.g.*, *Goodyear Aerospace*, 813 F.2d at 1542-1543; *Kimberly-Clark*, 511 F.2d at 1361 & n.12.

b. Petitioner errs in contending (Pet. 8) that *New Orleans Steamship Ass'n* v. *EEOC*, 680 F.2d 23 (5th Cir. 1982), suggests to the contrary. In that case, the Fifth Circuit held that "the EEOC may challenge a transaction which was the subject of prior judicial scrutiny in a private [Title VII] suit, *if the subsequent challenge seeks*

different relief." *Id.* at 25 (emphasis added). In this case, the EEOC indeed seeks broader (and therefore different) relief from that sought in the earlier private action. Accordingly, the Eleventh Circuit's holding in this case that EEOC may seek such relief is consistent with the decision in *New Orleans Steamship Ass'n*.[3]

The other cases cited by petitioner in support of its claim of conflict did not arise under Title VII, but instead arose under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* See Pet. 6-7 (citing *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990); *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)). In holding that the EEOC may not seek monetary relief that would be unavailable to specific victims, the courts in those cases relied on "the ADEA's distinctive scheme," which, according to those courts, makes the EEOC the "representative" of individual victims. *North Gibson Sch. Corp.*, 266 F.3d at 615 (stating that "the drafters of the ADEA consciously departed from the enforcement scheme of Title VII"); *United States Steel Corp.*, 921 F.2d at 494; see *id.* at 494 n.4 (stating that "the framers of the ADEA consciously departed" from "the enforcement scheme of Title VII"). The EEOC disagrees with that reasoning. But in any event, it does not extend to Title VII. As this Court held

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[3] In addition, *New Orleans Steamship Ass'n* was premised in part on the need to avoid duplicative litigation. See *Baker (Trucillion)* v. *King's Daughters Hosp.*, 614 F.2d 520, 524 (5th Cir. 1980), cited in *New Orleans Steamship Ass'n*, 680 F.2d at 25-26 & n.8. In light of the EEOC's repeated unsuccessful attempts to consolidate this case with *Thomas*, that rationale would not apply here. Indeed, it was petitioner's strenuous opposition to consolidation that essentially ensured that a separate trial would be required for EEOC's more comprehensive action.

in *General Tel. Co.* v. *EEOC*, 446 U.S. at 326, "[t]he EEOC is not merely a proxy for the victims of discrimination" under Title VII. Even "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Ibid.* The Seventh Circuit implicitly recognized that distinction in *Ameritech*, 220 F.3d at 821, where it held that the EEOC would not be bound by a judgment in a private Title VII case to which it was not a party. Accord *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002) (EEOC does not sue as representative of discrimination victims; "primary role is that of a law enforcement agency").

In any event, all of the cases relied on by petitioner predate this Court's decision in *Waffle House*. Since *Waffle House*, both the Fifth and Seventh Circuits have issued decisions indicating that, because of its interest in law enforcement, a federal agency such as the EEOC may obtain relief for a victim of discrimination even if that individual could not obtain the same relief himself. See *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495 (5th Cir. 2003) (government is authorized to bring suit under Americans with Disabilities Act even though private suit would be barred by Eleventh Amendment, noting that government may determine whether public resources should be committed to recovery of victim-specific relief); *EEOC* v. *Board of Regents*, 288 F.3d 296, 299-300 (7th Cir. 2002) (same, under ADEA). Those rulings indicate that, contrary to petitioner's suggestion, those circuits would not disagree with the Eleventh Circuit's holding in this case.

3. Finally, petitioner argues (Pet. 11-12) that further review should be granted on what petitioner describes as an "issue of first impression" to ensure that

the EEOC is denied "a second chance to try a class-wide hostile environment claim based on the same evidence [the *Thomas* plaintiffs] unsuccessfully presented in an effort to prove the same work environment was hostile." The fact that, in petitioner's terms (Pet. 11), this case "will decide the preclusive nature of *twenty-two jury verdicts*" does not make it of sufficient general importance to warrant further review by this Court.

Even if it were less fact-bound, petitioner's claim that the *Thomas* litigation should have precluded this action would not warrant further review, because the court of appeals correctly held that, under any recognized theory, the EEOC was not in privity with the *Thomas* plaintiffs. See generally Pet. App. 5-25. Petitioner bases its privity arguments on the theories that the *Thomas* plaintiffs were the "virtual representative" of the EEOC and that the EEOC "assist[ed] in the prosecution or defense of [the *Thomas*] action." Pet. 13-14. This Court, however, flatly rejected similar attenuated notions of privity in *Richards* v. *Jefferson County*, 517 U.S. 793, 801-803 (1996), and *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167-168 (1999).

Although petitioner purports to rely (Pet. 13-14) on this Court's decision in *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979), that case is inapposite. *Montana* does not speak of "virtual representation" at all; given a federal agency's law enforcement interests, the theory is ill-suited to enforcement actions such as this one by the EEOC. See Pet. App. 17-25 (discussing case law). Nor was the EEOC's role in *Thomas* remotely comparable to the level of control or "assistance" exercised by the United States in *Montana*, where the Government required the original lawsuit to be filed in state court, reviewed and approved the complaint, paid the

attorney's fees and costs, directed the appeal to the Montana Supreme Court, appeared and submitted an amicus brief in the Montana Supreme Court, directed the filing of a notice of appeal to this Court, and effectuated the plaintiff's abandonment of that appeal when the Government filed its own suit in district court. See Pet. App. 16 (citing 440 U.S. at 155); compare Pet. App. 17 (EEOC did not sit at counsel table during trial in this case, examine witnesses, proffer evidence, or exert any control over decisions including what claims to assert and whether to appeal).

Moreover, as the court of appeals recognized, "the equities of this case * * * weigh strongly against a finding of privity." Pet. App. 25. In successfully opposing consolidation of this action with *Thomas*, petitioner argued that EEOC's action, claim and evidence were "substantially different" from those in *Thomas*. District docket No. 6 (Defendant's Response to EEOC's 1st Consolidation Motion 1-5). Further, petitioner informed the district court:

> The [*Thomas*] case consists of [a number of] individual cases filed together. Each of [these] Plaintiff's cases * * * must stand on its own merits. The EEOC's case is obviously much broader in that it does not allege that any particular employee has been subjected to a hostile environment. Instead, it alleges class-wide discrimination and opens the door to evidence that would be potentially wholly inadmissible in [*Thomas*].

District docket No. 30 (Defendant's Response to EEOC's 2d Consolidation Motion 3). In light of those arguments, petitioner should not now be heard to argue that the suits are so similar that this Court should inter-

cede to ensure that the EEOC may not try its action separately.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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